IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1058 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO No

2. To be referred to the Reporter or not? No :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? No :

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LALUBHAI DALABHAI NINAMA
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 1058 of 1993
MR DF AMIN for the appellants
MR KG SHETH, APP for Respondents

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 19/09/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

In this appeal, which is filed under section

374(2) of the Code of Criminal Procedure, 1973, the appellants have challenged legality of judgment dated August 9, 1993 rendered by the learned Additional Sessions Judge, Panchmahals at Godhra, in Sessions Case No. 31/91, by which the appellants are convicted under section 302 read with section 34 of the Indian Penal Code and punished with imprisonment for life and fine of Rs. 100/- i/d. R.I. for 15 days.

2. Deceased Badharbhai Mithiya was resident of Dahod town, District : Panchmahals. He was residing in a hut situated in Golvad Falia. Near his house, house of witness Kodarbhai Chhaganbhai is situated. The incident in question took place on July 3, 1990 at about 5.00 P.M. On that day, the deceased had gone to the house of witness Kodarbhai Chhaganbhai where witness Kodarbhai Chhaganbhai and his brother Somabhai were partitioning their properties, as they had decided to stay separate from each other. While the deceased was sitting in the house of witness Kodarbhai, the appellant no.1 came there and demanded Rs. 20/- from the deceased, as the appellant no.1 wanted to consume liquor. The deceased refused to give money as demanded by the appellant no.1 and, therefore, the appellant no.1 gave a blow with a stone on the head of the deceased and ran away. Thereafter the deceased left the house of witness Kodarbhai and when he was near the house of one Revala Kachara, both the appellants came there and when the deceased was trying to point out that he was hit with stone by the appellant no.1, the appellant no.1 inflicted another blow with stone on the back of his head, whereas the appellant no.2 gave stick blows on the back of the deceased. Because of the injuries sustained by the deceased, he fell down and died on the spot. The wife of the deceased i.e. Gesuben Hirsan Badhar lodged complaint at Dahod Rural Police Station. Immediately the complaint lodged by Gesuben was investigated by Mr. C.M. Mudaliyar, who was then Police Sub Inspector of Dahod Rural Police Station. Inquest was held on the dead body of the deceased in presence of panch witnesses and dead body was thereafter sent for post mortem examination. Autopsy on the dead body of the deceased was performed by Medical Officer Mr. Patel of Cottage Hospital, Dahod on July 4, 1990. The statements of those who were found conversant with the facts of the case, were recorded and panchnama of place of incident was prepared by the investigating officer on July 4, 1990 in presence of panch witnesses. The appellants were arrested on July 5, 1990 and incriminating articles were also seized. The articles seized were sent to Forensic Science Laboratory for analysis and report of the Analyst was obtained. On

conclusion of the investigation, the appellants were chargesheeted in the Court of learned Judicial Magistrate, First Class, Dahod of the offences punishable under section 302 read with section 34 of the Indian Penal Code and section 135 of the Bombay Police Act. As the offence punishable under section 302 I.P.C. is exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Panchmahals at Godhra for trial where it was numbered as Sessions Case No.31/91.

3. The charge at Exh.2 was framed by the learned Judge against the appellants of the offences punishable under section 302 read with section 34 of the Indian Penal Code and section 135 of the Bombay Police Act. The charge was read over and explained to the appellants, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (i) Gesuben Hirsan Badhar, PW.1 Exh.12, (ii) Dr. Ramanbhai Mangalbhai Patel, PW 2 Exh.30, (iii) Dr. Babulal Badriprasad Mittal, PW.3 Exh.16, (iv) Kodarbhai Chhaganbhai, PW.4 Exh.18, (v) Dharji Khimla, PW.5 Exh.19, (vi) Gordhanbhai Somji, PW.6 Exh.22, (vii) Virsingbhai Nagjibhai, PW.7 Exh.23, (viii) Kaliben Matarabhai, PW.8 Exh.25, and (ix) Chandrashekhar Maneklal Mudaliyar, PW.9 Exh.26, to prove its case against the appellants. The prosecution also produced documentary evidence, such as, inquest held on the dead body of deceased Badharbhai, report of serologist, postmortem notes of the deceased prepared by Dr. R.M.Patel, certificate of injury sustained by appellant no.1, panchnama of place of incident, complaint filed by Gesuben etc. in support of its case against the appellants. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants the incriminating circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements as required by section 313 of the Code. In their further statements, the appellants stated that the case of the prosecution against them was false, but did not examine any witness in support of their defence.

4. On appreciation of evidence led by the prosecution, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that the deceased had died a homicidal death. The learned Judge after placing reliance on the evidence of (i) witness Gesuben Hirsan Badhar, (ii) witness Kodarbhai Chhaganbhai,and (iii) witness Kaliben Matarabhai, held that it was proved by the prosecution that the appellant no.1 had caused injuries on the head of the deceased by means of a stone and as the medical evidence on record established that

the injuries sustained by the deceased were sufficient in the ordinary course of nature to cause his death, the appellant no.1 was liable to be convicted under section 302 of the Indian Penal Code. The learned Judge after referring to the evidence of prosecution witnesses, deduced that the appellant no.2 in furtherance of common intention had gone with the appellant no.1 armed with a stick and had caused injury to the deceased by means of a stick and was, therefore, liable to be convicted under section 302 read with section 34 of the Indian Penal Code. The learned Judge further held that no reliable evidence was led by the prosecution to establish charge against the appellants of the offence punishable under section 135 of the Bombay Police Act. In view of the above referred to conclusions, the learned Judge by judgment dated August 9, 1993 has convicted the appellants of the offences punishable under section 302 read with section 34 of the Indian Penal Code and imposed punishment on them, which is referred to earlier, giving rise to the present appeal.

5. Mr. D.F. Amin, the learned counsel for the appellants after taking us through the entire evidence on record submitted that the evidence of witness Gesuben Hirsan Badhar indicates that she had not witnessed the incident in question at all because four different places of occurrence are pointed out by her in her evidence as well as in the complaint and, therefore, her evidence should not have been relied upon by the learned Judge for the purpose of convicting the appellants. The learned counsel pleaded that the evidence of prosecution witnesses is full of exaggeration as well as material contradictions and, therefore, it should not have been relied upon by the learned Judge for the purpose of coming to the conclusion that the charges levelled against the appellants were proved by the prosecution. What was claimed by the learned counsel for the appellants was that all the witnesses who are examined by the prosecution in the present case, are interested witnesses and as their testimony is not supported by any independent witnesses, they should not have been relied upon by the learned Judge. According to the learned counsel for the appellants, appellant no.1 had sustained injury in the incident which is not explained by any of the prosecution witnesses and, therefore, after doubting the genesis of the incident as well as prosecution case, the appellants ought to have been acquitted by the learned Judge. It was submitted that as per the prosecution case the incident had taken place in two parts and after the first part of the incident, the appellant no.1 had gone to his house and had come bacak

with appellant no.2 and, therefore, in view of this evidence led by the prosecution, the appellant no.2 should not have been convicted under section 302 read with section 34 of the Indian Penal Code, more particularly when medical evidence does not establish that the deceased had sustained any injury on his back which could have been caused by means of a stick. In the alternative, it was urged by the learned counsel that the prosecution has not established that the appellant no.1 had intention to cause death or such bodily injury as was likely to cause death of the deceased, nor knowledge that such bodily injury was likely to cause death of the deceased can be attributed to the appellant no.1 and, therefore, conviction of the appellant no.1 should be altered to one under section 324 of the Indian Penal Code and punishment imposed should be suitably modified. The learned counsel stressed that the evidence on record has been misappreciated by the learned Judge and, therefore, the appeal filed by the appellants should be accepted by the Court.

6. Mr. K.G.Sheth, learned A.P.P. argued that the evidence of witness Gesuben Hirsan Bhadhar, who is wife of the deceased, is corroborated in material particulars not only by her complaint, but also by the evidence of witness Kodarbhai Chhaganbhai as well as witness Kaliben Matarabhai and, therefore, conviction of the appellants under section 302 read with section 34 of the Indian Penal Code should be upheld by the Court. According to the learned A.P.P., contradictions appearing in the evidence of eye witnesses are not material and as they do not destroy the substratum of the prosecution case, the appellants are not entitled to acquittal as is claimed in the appeal. According to the learned counsel for the State, evidence of eye witnesses stands amply corroborated by the medical evidence on record and in view of the positive medical evidence on record of the case to the effect that injuries sustained by the deceased were sufficient in the ordinary course of nature to cause his death, conviction of the appellants under section 302 read with section 34 I.P.C. should be maintained by this Court. The learned counsel for the State urged that evidence of prosecution witnesses establishes that the appellant no.2 armed with a stick had gone with the appellant no.1 and participated in the crime and, therefore,his conviction under section 302 read with section 34 I.P.C. should be upheld. In the alternative, the learned counsel pleaded that in any view of the matter, knowledge can be attributed to the appellant no.1 that the bodily injury caused by him was likely to cause death of the deceased and, therefore, the

appellant no.1 should be convicted under section 302 Part-I or Part-II I.P.C.

7. We have heard the learned counsel for the parties and reappreciated the whole evidence on record. The fact that the deceased had died a homicidal death is not in dispute and stands amply proved by the evidence of Dr.R.M.Patel, PW.2 Exh.13. Dr. Patel in his substantive evidence before the Court has stated that he had performed the autopsy on the dead body of the deceased on July 4, 1990 and noticed seven external injuries as well as five internal injuries. According to the doctor, the internal injuries were corresponding to the external injuries and that the injuries no.1 & 2, which proved fatal, were possible by blow with a stone. The injuries noticed by Dr. Patel while performing autopsy on the dead body of the deceased are also mentioned in postmortem notes produced on the record of the case at Exh.14. Further the injuries sustained by the deceased are also mentioned in detail in the inquest report Exh.8, which was prepared on July 3, 1990 in presence of independent witnesses. According to Dr. Patel, the cause of death of the deceased was shock due to head injury. In view of the above referred to evidence which is adduced by the prosecution, we are of the opinion that it is satisfactorily established by the prosecution that the deceased had died a homicidal death. This finding which is recorded by the learned Judge being eminently just is hereby upheld.

8. The evidence of witness Gesuben Hirsan Badhar, PW.1 Exh.12 would show that the deceased was her husband and on the date of incident had gone to the house of witness Kodarbhai Chhaganbhai and Somabhai. According to witness Gesuben, witness Kodarbhai and his brother were partitioning their properties and the deceased was sitting in the house of Kodarbhai. What is claimed by the witness before the Court is that at that time, the appellant no.1 had gone to the house of witness Kodarbhai and demanded Rs.20/- from the deceased for the purpose of consuming liquor and on refusal by the deceased to pay the amount, the appellant no.1 had inflicted a blow with stone on the head of the deceased. This witness has further stated in her evidence that on receipt of the injuries, the deceased had come to his house and that both the appellants had again come near her house after about 5 minutes. According to this witness, at that time the deceased had tried to know from the appellants as to why he was beaten and at that time, the appellant no.1 had inflicted another blow with stone on neck of the deceased, whereas the appellant no.2 had inflicted blow

with a stick on the back of the deceased, as a result of which, the deceased had fallen down. The witness has also claimed that she had raised shouts, as a result of which, Kodarbhai, Somabhai, Tajsing, Sunakiben, Kaliben, Dharji etc. had rushed to the place of incident, but the deceased had died on the spot. The witness informed the Court that after the incident, she had gone to Dahod Rural Police Station and lodged complaint against the appellants.

9. In cross-examination by the defence, the witness stated that her husband had cordial relations with the appellants and that she was not able to say as to why the appellant no.1 had not demanded any amount either from witness Kodarbhai or from his brother and had demanded the amount from her husband for the purpose of consuming liquor. The witness admitted that after refusal to pay amount to the appellant no.1, her husband had gone to the field of Revala Kachara and that in the field an altercation had taken place between the appellants and the deceased. The witness also admitted that she had stated in her police statement that the appellants and the deceased were grappling with each other and were wallowing. The witness also stated that grappling had continued for 2 to 3 minutes and that Mala had not intervened in the incident. The witness denied the suggestion made by the defence that the incident had not taken place in front of her house and that she was falsely deposing before the Court that she had witnessed the incident. The witness also admitted that she had stated in her complaint that the incident had taken place in the field of Revala Kachara. Further the witness denied the suggestion made by the defence that the incident which had taken place in the field of Revala Kachara was not witnessed by her. In her cross-examination, the witness explained that when her deceased husband was inflicted blow with a stone by the appellant no.1, the distance between appellant no.1 and the deceased was 5 to 7 steps. The witness also admitted that her husband and the appellants were abusing in bhilodi language.

10. If we read the complaint lodged by this witness,it becomes evident that in the complaint also the witness has stated that when her husband was sitting in the house of witness Kodarbhai, the appellant no.1 had demanded money for consuming liquor and on refusal to pay money, the appellant no.1 had inflicted blow with a stone on head of the deceased. Further in the complaint it is stated by the complainant that she had gone to the place

where altercation was taking place between the appellants and the deceased and that the appellant no.1 had inflicted another blow on the head of the deceased, whereas the appellant no.2 had inflicted blows with Nilgiri stick which was in his hands. It is relevant to notice that Gesuben Hirsan Badhar is wife of the deceased and had lodged complaint promptly against the appellants. In the complaint, names of the eye witnesses, namely, Kodarbhai Chhaganbhai and Kaliben Matarabhai are also mentioned. It is not suggested to this witness that she had enmity with any of the appellants and, therefore, was out to implicate the appellants falsely in such a serious offence. The witness being wife of the deceased would not allow the real culprits to go scot free and involve innocent persons falsely in such a serious case. It is true that in her deposition before the Court and in the complaint, this witness has mentioned different places where the incident had taken place. However, it must be remembered that her deposition was recorded after a period of 2 years and 9 months of the date of the incident and, therefore, in such circumstance some contradictions are bound to appear in the evidence of a rustic villager like the complainant regarding the place of incident. The contradictions appearing in the evidence of this witness are not material so as to discredit her totally. We may mention that though the incident had taken place in two parts, places of incident which have been mentioned by witness Gesuben in her evidence are in close vicinity of each other and her evidence does not create any doubt about her version that the first incident had taken place either near her house or at the house of witness Kodarbhai Chhaganbhai and that the second part of the incident had taken place in the field of Revala Kachara. Therefore,in our view, the learned Judge did not commit any error in placing reliance on the deposition of this witness for coming to the conclusion that the appellant no.1 had caused injuries to the deceased by means of a stone.

11. This brings us to consideration of evidence of another eye witness i.e. Kodarbhai Chhaganbhai PW 4 Exh.18. This witness in his examination-in-chief has stated that house of the deceased is situated near his house in the same falia and that he is knowing the appellants. The witness has testified before the Court that on the date of incident, he was partitioning properties with his brother and the deceased was sitting in his house. The witness has informed the Court that at that time the appellant no.1 had come to his house and demanded money from the deceased for consuming liquor. The witness has claimed that the deceased had refused to

give money and left his house. According to this witness, when the deceased had left his house, the appellant no.1 had followed him and inflicted blow with stone on back of head of the deceased. The witness has further stated that thereafter the appellant no.1 had run away towards his house and after sometime again the appellant no.1 had come with the appellant no.2. According to this witness, at that time also the appellant no.1 had given blow with a stone on the deceased, whereas appellant no.2 had given 2 to 3 blows with Nilgiri stick on the back of the deceased. The witness has claimed that he had seen the whole incident and that because of injuries sustained by him the deceased had died on the spot. In his cross-examination, the witness stated that his police statement was recorded on the same day and that he had not stated in the said statement that as there was altercation between the witness and his brother regarding partition of the properties, the deceased had come and persuaded the witness and his brother not to quarrel. The witness also denied the suggestion that after refusal to pay money to the appellant no.1, the deceased had gone to his house. The witness stated that he has not mentioned in his police statement that as the deceased had gone to his house, he was followed by appellant no.1. The witness has admitted that the deceased was shouting at the appellant no.1 in the field of Revala Kachara and trying to know as to why he was hit with a stone. The witness also admitted that whatever happened near the house of the deceased could only be seen after coming out of his house. The witness also admitted that the door of the house of the deceased would not be visible from his house. The witness stated that he had not seen that the appellant no.1 had sustained bleeding injury. The witness also claimed that he had not stated in his police statement that the deceased was pointing out the injuries caused to him by appellant no.1, to Malabhai i.e. appellant no.2 and at that time, the appellant no.1 had caused injury to the deceased by means of a stone. The witness clarified in his cross-examination that the deceased was not his relative and that the appellants were his brothers. A reasonable reading of the evidence of this witness makes it manifest that this witness had all opportunity to witness the incident in question. His evidence establishes that the appellant no.1 had caused two injuries to the deceased by means of a stone. It is relevant to notice that he is not related to the deceased, but is related to the appellants. It was never suggested to this witness that he was on inimical terms with the appellants.. Under the circumstances, false implication of the appellants by him is totally ruled

out. The evidence of Gesurben, who is wife of the deceased stands amply corroborated by eye witness Kodarbhai, who is in a sense, an independent witness. In our view, therefore, the learned Judge of the Trial Court did not commit any error in placing reliance on the deposition of Kodarbhai.

12. The evidence of witness Kaliben Matarabhai, PW.8 Exh.25 shows that her house is situated near the house of Devla Kachara. According to her, at the time when the incident took place, she was standing in open space in front of house of witness Kodarbhai Chhaganbhai. This witness in her examination-in-chief has stated that at the time when witness Kodarbhai and his brother Somabhai were partitioning the properties, the deceased was sitting in the house of Kodarbhai and that the appellant no.1 had demanded money from the deceased, but the deceased had refused to pay money. According to this witness, at that time the appellant no.1 had given blow with a stone on head of the deceased. The witness has informed the Court that thereafter the appellant no.1 had gone to his house whereas the deceased had gone to his house and she had returned to her house. What is mentioned by this witness before the Court is that when she was feeding her son, the deceased had told the appellant no.1 that as to why he had run away after hitting stone on him and at that time the deceased was in the field of Revla Kachara. The witness has specifically stated that at that time the appellant no.1 had given blow with stone to the deceased; whereas the appellant no.2 had given blows with stick on the back of the deceased, as a result of which the deceased had bled profusely and died on the spot. In her cross-examination, the witness stated that though she had gone with witness Gesuben to the Police Station, she herself had not informed the police that she had witnessed the incident. The witness further stated that the complaint was lodged by brother of the deceased. The witness denied suggestion made by the defence that on refusal to pay the amount, the appellant no.1 had gone to his house. The witness claimed that she had not stated in her police statement that after refusal by the deceased to pay Rs. 20/- to appellant no.1 for consuming liquor, the deceased had gone to his house and appellant no.1 to his house. The witness in her cross-examination maintained that at the time when the deceased was hit with a stone by the appellant no.1, she was present and others i.e. Kodarbhai, wife of the deceased etc. were also present. The witness denied the suggestion that the appellant no.1 and the deceased were fighting interse. The witness clearly stated in her cross-examination that

when the second blow with stone was inflicted by the appellant no.1, she was very near to the deceased. The witness also stated that first of all the appellant no.1 had caused injury to the deceased by means of a stone and thereafter the appellant no.2 had given blows with stick. The witness further explained that she had not intervened in the incident because the appellants were throwing stones at the house of the deceased. The witness clearly denied the suggestion of the defence that she had not witnessed the incident in question.

13. A reasonable reading of the evidence of this witness also makes it clear that she had witnessed the incident and she has no reason to implicate the appellants falsely in the present case. In fact, we do not find any major contradictions appearing in her evidence and, therefore, there is no reason to disbelieve what is stated by this witness in her substantive evidence before the Court. The evidence of this witness is natural and her presence at the time of incident can hardly be doubted. Further the name of this witness as an eye witness is also mentioned in the complaint which was filed promptly. Thus, the evidence of Gesuben Badhar, who is wife of the deceased, is materially corroborated by the evidence of eye witness Kaliben also.

14. The evidence of Dr. Patel, who performed autopsy on the dead body of the deceased, establishes that two external injuries sustained by him were possible by a stone and therefore, the evidence of eye witnesses before the Court to that extent stands corroborated by the medical evidence on record. There is no manner of doubt that the evidence of three eye witnesses fully stands corroborated by medical evidence on record. Under the circumstances, the finding recorded by the learned Judge that the appellant no.1 had caused injuries to the deceased by stone is eminently just and is hereby upheld.

15. The submission that injuries sustained by appellant no.1 are not explained by the prosecution witnesses which raises doubt about the genesis of the incident and, therefore, the prosecution case should be disbelieved, has no substance. We may state that the evidence of Dr. Babulal B. Mittal, PW.3 Exh.16 shows that the appellant no.1 had sustained two simple injuries which could have been caused by hard and blunt substance. The doctor has not stated that injuries sustained by the appellant no.1 were bleeding injuries. Further in the complaint which was filed by the appellant no.1 against the deceased it was stated by the appellant no.1 that he was hit with a stone by the deceased, but Dr. Mittal has

not clarified as is clarified by Dr. Patel in the case of the deceased that two injuries which were sustained by appellant no.1, were possible by means of a stone. Thus, the medical evidence does not support the case which is pleaded by the appellant no.1 in his complaint. Moreover, the injuries sustained by the appellant no.1 are explained by witness Gesuben Badhar, PW.1 Exh.12, inasmuch as she has specifically stated that the appellant no.1 as well as the deceased were grappling with each other and were wallowing. Thus, it is wrong to contend that injuries sustained by the appellant no.1 are not explained by the prosecution witnesses so as to cast doubt on the prosecution version. Moreover, the Supreme Court in Jagdish v. State of Rajasthan, AIR 1979, SC 1010 has ruled that before obligation is placed on the prosecution to explain injuries on accused, two conditions must be satisfied; (i) that the injuries on the person of the accused must be very serious and severe and not superficial, and (ii) that it must be shown that these injuries must have been caused at the time of occurrence in question. As observed earlier, the injuries on the person of appellant no.1 were superficial and simple and not serious in nature at all. It was never suggested to any of the witnesses by the defence that the appellant no.1 had sustained these injuries at the time of occurrence in question. Under the circumstances, even if one comes to the conclusion that the prosecution witnesses have failed to explain injuries sustained by appellant no.1, no benefit can be granted to the appellants and the prosecution case cannot be disbelieved on the ground that the prosecution witnesses have failed to explain injuries sustained by the appellant no.1.

16. At this stage, we would consider the question as to whether the learned Additional Sessions Judge was justified in convicting the appellant no.2 of the offence punishable under section 302 with the aid of section 34 of the Indian Penal Code. What three eye witnesses have stated before the Court is that after inflicting first blow on the head of the deceased, the appellant no.1 had again come with the appellant no.2 and that the appellant no.1 had inflicted another blow with a stone on the head of the deceased; whereas the appellant no.2 had inflicted stick blows on the back of the deceased. The medical evidence on record and more particularly postmortem notes of the deceased do not establish that the deceased had sustained any injury on his back which could have been caused by means of a stick. No injuries on the back of the deceased were noticed when inquest on the dead body was held in presence of independent witness. The

prosecution evidence would establish that the appellant no.2 had accompanied the appellant no.1, but had not done any overact at all. Further the evidence of three prosecution witnesses proves that after first blow was inflicted on the deceased with a stone by the appellant no.1, he had gone to his house and the appellant no.1 had come with his brother i.e. the appellant no.2. The evidence also makes it evident that thereafter there was exchange of abuses between the appellants and the deceased, as a result of which, appellant no.1 had picked-up a stone and hit the same on the head of the deceased. Thus, it can not be said that the appellant no.2 had shared intention of the appellant no.1 to cause death of the deceased and he having not played any overact,is not liable to be convicted under section 302 I.P.C. with the aid of section 34 I.P.C. Having regard to the facts of the case, it is difficult to conclude that in furtherance of common intention, the appellant no.2 had caused any injury to the deceased and, therefore, in our view, he could not have been convicted under section 302 I.P.C. with the aid of section 34 I.P.C. Thus, his conviction is liable to be set aside.

17. This brings us to the question as to the nature of offence committed by appellant no.1. The autopsy on the dead body performed by Dr. Patel,PW.2 Exh.13 shows that the deceased had sustained seven external injuries and five internal injuries. According to the doctor, internal injuries were corresponding to the external injuries. Further according to the doctor, injuries no.1 & 2 were possible by stone and were sufficient in the ordinary course of nature to cause his death. While performing the postmortem, the medical officer had noticed following external injuries on the dead body of the deceased; (i) C.L.W. over right from parietal region 4 cm x 2 cm x 5 cm deep, (ii) C.L.W. over occipital part right side 5 cm x 2 cm scalp deep bleeding, (iii) Abrasion over left side chest 4 cm x 2 cm, (iv) Abrasion over right shoulder 3 cm x 1.5 cm, (v) C.L.W. over left cubital fossa 2 cm x 1 cm x 1 cm Blood dried, (vi) Abrasion over right elbow 3 cm x 2 cm, and (vii) Contusion over right scapular part 6 cm x 3 cm.

On internal examination, it was noticed that there was haematoma over scalp at site of injuries no.1 & 2. The doctor also noticed fissured fracture of size 1" over right front parietal part. Moreover, there was haemorrhage over right side frontal lobe and brain. The evidence of eye witnesses establishes that the deceased had died on the spot. If the evidence of eye witnesses is read with medical evidence on record, there is no

manner of doubt that serious injuries were caused to the deceased and that the deceased had died on the spot. However, the evidence of eye witnesses also makes it very clear that there is no positive evidence on record to establish that the first blow was given by the appellant no.1 while holding stone in his hands. Further the intention of the appellant no.1 was to obtain money from the deceased for the purpose of consuming liquor and not to cause his death. Under the circumstances, it is difficult to cull out the intention to cause death or such bodily injury as was likely to cause death in the ordinary course of nature and, therefore, in our view offence would not fall under section 302 I.P.C. However, knowledge that the bodily injuries caused to the deceased were likely to cause his death is certainly attributable to the appellant no.1 and the act of the appellant no.1 would amount to culpable homicidal not amounting to offence of murder, but would be punishable under Part-II of section 304 I.P.C. Having regard to the totality of evidence on record and facts of the case, the conviction of the appellant no.1 deserves to be converted into one punishable under Part-II of section 304 I.P.C.

For the foregoing reasons, the appeal partly succeeds. The appellant no.2 is acquitted of the offence punishable under section 302 read with section 34 of the Indian Penal Code. Fine, if paid by him, shall be refunded to him. The conviction of appellant no.1 is altered from section 302 I.P.C. to one punishable under Part-II of section 304 I.P.C. The record of the case indicates that the appellant no.1 has undergone actual sentence of more than 8 years. Therefore, we are of the view that interest of justice would be served if the appellant no.1 is sentenced to imprisonment which he has already undergone for the offence punishable under Part-II of section 304 I.P.C. Accordingly, the appellant no.1 is punished with imprisonment which he has already undergone for the offence punishable under Part-II of section 304 I.P.C. As the appellant no.1 has undergone sentence imposed on him for the offence punishable under Part-II of section 304 of the Indian Penal Code, the authorities are directed to release him immediately, unless his presence is needed with reference to any other case. Muddamal is ordered to be disposed of in terms of directions given in the impugned judgment.

(J.M.Panchal,J.)

(A.H.Mehta, J.)

(patel)